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In The

Supreme Court of the United States

October Term, 1972

No. 72-242

DENIS HANLY, SIEN WEI LIU, IRVING ZUCKERMAN, FRANK MOSCO, COVELLE N. BURBANK, DENNIS SULLIVAN, and MARIE BEAULIEU on behalf of themselves and all others similarly situated,

Petitioners,

-against-

RICHARD E. KLEINDIENST, as Attorney General of the United States, ROBERT L. KUNZIG, as Administrator of General Services of the United States, NORMAN A. CARLSON, as Director of Federal Bureau of Prisons and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RICHARD E. KLEINDIENST, as Attorney General of the United States, ROBERT L. KUNZIG, as Administrator of General Services of the United States, NORMAN A. CARLSON, as Director of Federal Bureau of Prisons and UNITED STATES OF AMERICA,

Respondents.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioners by their attorney, ALFRED S. JULIEN, respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 17, 1972.

Opinion Below

The Court of Appeals' opinion is not yet officially reported, although it appears in 4 ERC[1] 1152. The opinion of the District Court for the Southern District of New York has not yet been officially reported. Both opinions appear in the appendix to this petition.

Jurisdiction

The Court of Appeals' order was entered on May 17, 1972 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Was the Court of Appeals in error in failing to stay construction of a proposed jail in back of the Federal Courthouse, New York, New York, pending compliance with the National Environmental Policy Act (42 U.S.C. §4321 et seq.) once it determined the Federal Government in proposing construction of this jail failed to comply with NEPA? (In contrast to this case the Court of Appeals for the Fourth Circuit in Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (1972) ordered construction stayed pending NEPA's compliance.)

2. Can the Federal Government avoid NEPA's requirements with respect to the jail, concededly a major federal activity, by unilaterally determin-

1. ERC is the abbreviation of the decision's volume of the Environment Reporter published by BNA.

ing without any environmental study that the construction of the jail does not significantly affect the quality of the human environment?

3. Can a high-rise prison, erected at a cost of over 20 million dollars (inclusive of a smaller office building) by the Federal Government in a congested residential and civic center area, conceivably be held to have no significant affect on the quality of human environment absent a complete environmental study as required by NEPA?

4. Were the Bureau of Prisons and the Department of Justice, in addition to the General Services Administration, required to comply with NEPA's provisions with respect to the planning and construction of the proposed jail?

Statutes and Regulations Involved

U.S. Code Title 42:

§4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality. Pub.L. 91-190, §2, Jan. 1, 1970, 83 Stat. 852.

§4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Pub.L. 91-190, Title I, §101, Jan. 1, 1970, 83 Stat. 852.

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible; (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in

accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting his quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review process;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals,

advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, §102, Jan. 1, 1970, 83 Stat. 853.

Executive Order No. 11514 Mar. 5, 1970, 35 F. R. 4247

Protection and enhancement of environmental quality

By virtue of the authority vested in me as President of the United States and in furtherance of the purpose and policy of the National Environmental Policy Act of 1969 (Public Law No. 91-190, approved January 1, 1970) (this chapter), it is ordered as follows:

Section 1. Policy. The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Sec. 2. Responsibilities of Federal agencies. Consonant with Title I of the National Environmental Policy Act of 1969 [sections 4331-4335 of this title], hereafter referred to as the "Act", the heads of Federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies. States, counties, municipalities, institutions, and other entities, as appropriate.

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f) Proceed, in coordination with other atencies, with actions required by section 102 of the Act [section 4332 of this title].

Statement of the Case

a. Facts

In 1971, the Federal Government, acting secretly insofar as any residents and associations in the neighborhood are concerned, suddenly decided upon a prison and office building on a narrow, triangular piece of land with an area of 51,340 square feet, one hundred and fifty feet away from nearby residential structures, in back of the present Federal Courthouse in lower Manhattan, New York City (Zuckerman Affidavit, 1-2). [2]

Two residential buildings are across the street. They are Chatham Green and Chatham Towers which are cooperative apartment houses erected with Title I Federal money. Both buildings have terraces, lawns and playgrounds facing the proposed prison and are principally occupied by families. Together they have 660 apartments with approximately 3,000 residents (Zuckerman Aff., 2). Both have received awards for architectural excellence.

GSA [3] is not just building a jail. This is a prison which will house those convicted of drug offenses from the Eastern District of New York,

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2. The Court of Appeals dispensed with the requirement of a joint appendix. Reference is made either to pages in the original record or in the government's appendix designated with the suffix "a".

3. Respondent Robert Kunzig's Agency, General Services Administration will be building the jail. Respondent Norman Carlson's Agency, the Bureau of Prisons, will operate it. Respondent Richard E. Kleindienst's Agency, the Department of Justice, participated in the selection of the site (3a).

the District of New Jersey and Southern District of New York. In addition, it is proposed that there be a community outpatient drug treatment clinic (3a). Outpatients with drug problems will be treated at the prison. Further, under another program, up to 48 persons will spend part of the day in the community either working or going to school and return to the jail in the evening (GSA Assessment of lack of Environmental Impact, June 15, 1972 [described infra, at 11], 14, 15).

A separate office building to be built on the same site as the jail, is not involved in the present proceeding. The area around the present Federal Courthouse and the site of the new buildings can without difficulty be described as crowded and congested. There are numerous buildings used for Federal, State and Municipal purposes. Streets are narrow. Besides Chatham Towers and Chatham Green, there are other residential buildings close by with a population of at least 50,000 people. Yet, the record before the Court of Appeals shows that no alternatives to the proposed site were genuinely considered.

The only pathway to the subway for the citizens of Chinatown and these two apartment buildings is through a narrow twenty foot street, Cardinal Hayes Place. Other means of access have previously been eliminated. Cardinal Hayes Place, which is directly between the new buildings and the present Federal Courthouse, will have two bridges over it linking the structures. After completion of the proposed construction, Cardinal Hayes Place will

be shrouded in darkness because of the tall structures on both sides and the bridges across it and will be frequented by visitors to the prisoners, out-patients, hangers on, bail bondsmen, and the like.

The construction site itself is rather small. The defendants claim it contains 51,340 square feet (2a), though such area may include parts of existing streets which the Government intends to narrow or eliminate. The site contains a Transit Authority substation which will remain there (5a). The two buildings are to be erected around it. The smaller building, housing offices, will be on the southerly portion of the site, the jail, on the northerly portion. Together, the buildings will contain about 345,000 square feet. Each will be about 167 feet high.

These buildings are being squeezed into this small construction site. They will be built right up to the property line, taking up more space than the approximately 300,000 square feet, which is allowed by the zoning laws (21a).

Transit facilities in the area are overcrowded. Parking on the street is for the most part prohibited. There are few parking lots, already overtaxed. In fact, giving the most charitable estimate and including lots several blocks away, there are only about 816 parking spaces available for the entire area.

In spite of the severe parking problem, GSA is not including a garage to handle cars of people using and visiting its new buildings.

This area already has a severe traffic problem because of its large population and narrow streets.

There was no attempt to comply with the National Environmental Policy Act. Respondents failed to file an environmental impact statement under §102(2)(C) (42 U.S.C. §4332[2][C]) of the Act.

Section 102(2)(C) sets forth what such a statement would contain. Further, the statute mandates certain additional duties both before and after such a statement is prepared. None were performed.

The respondents did produce two letters by subordinate officers relating to the proposed construction. The first such letter dated February 23, 1971 by George M. Paduano, who was then Regional Director of the Public Buildings Service of the GSA was to the effect that the proposed construction "will have no adverse effects on the environment." (The complete text of this letter is quoted in the Court of Appeals' Decision, 3117-19.)

The second letter dated April 29, 1971 by A. F. Sampson, the Commissioner of the Public Buildings Service, stated that it applied only to the office building and not to the jail. The construction and operation of the office building was "not considered a major federal action significantly affecting the quality of the human environment" (33a).

These letters are not proper compliance with §102(2)(C). The Court of Appeals so held.

There has been no compliance with other NEPA provisions, either. These other provisions exist separate and apart from the provision mandating an environmental impact statement. They require utilizing a systematic inter-disciplinary approach to planning decisions which may have an environmental impact (§102[2][A]); require consulting with the Council on Environmental Quality (§102[2][B]); and require developing and describing appropriate alternatives to the recommended course of action (§102[2][D]). None of these requirements were met by any federal agency involved in this case.

b. Procedural History

Petitioners suing for themselves and others similarly situated are residents and businessmen of the area. They began this action by service of a summons, complaint and order to show cause requesting a preliminary injunction on February 18, 1972, a few days after excavation had started preparatory to construction. Jurisdiction was based on the existence of a Federal question (28 U.S.C. §1331). The District Court denied a preliminary injunction because it found that GSA's conclusion that the buildings "will not have a significant adverse impact on the environment... was not arbitrary, capricious, abuse of discretion or otherwise not in accordance with the law." The District Court further concluded that plaintiffs did not demonstrate a likelihood of success on the merits or irreparable harm if the injunction was not issued and that the balance of equities rested with the respondents.

Statement of the Case

Petitioners appealed to the United States Court of Appeals. That court held that the petitioners were entitled to a preliminary injunction against further construction of the proposed jail until such time as GSA has made a proper determination of whether the proposed jail significantly affects the quality of the human environment. The court specifically held that GSA could still determine that the jail did not significantly affect the quality of the human environment. The court concluded its holding with respect to the jail by saying:

> "...because of the urgency of the situation and the district court's finding on the balance of hardships, we suggest that the injunctive order be stayed for a short period of time, but no more than 30 days, to allow the necessary threshhold determination of the jail's environmental impact to be made while the preliminary work on the construction site continued" (3124).

In effect, even though the Court of Appeals found NEPA violated, its decision was meaningless because it allowed construction to continue.

The court affirmed the denial of a preliminary injunction with respect to the office building. (This holding is not at issue in this petition for certiorari.)

The District Court entered an order to effectuate the Court of Appeals' mandate. This Order provided that the preliminary injunction would not

take effect before June 22, 1972. The Order further provided that the plaintiffs would have ten days from the filing of GSA's determination under NEPA to seek review of that determination.

Petitioners applied to the Court of Appeals for an order recalling and modifying their mandate and for a stay of the jail's construction pending a decision on their application for a Writ of Certiorari to the United States Supreme Court. This application was denied by an Order dated June 2, 1972.

Petitioners then applied to this Court for a stay of construction of the jail pending the decision on their application for a Writ of Certiorari. Mr. Justice Marshall denied this application on July 7, 1972.

As could be anticipated, on June 15, 1972, GSA filed a completely inadequate assessment that the proposed jail would not significantly affect the environment. No environmental impact statement has ever been filed.

Because of the procedure adopted by the Court of Appeals, no voice or opposition to the jail has ever been heard or considered by any federal agency. Those in the federal agency acted on their own. They consulted no one. They never visited the affected premises or talked to anyone living in the neighborhood.

Reasons for Granting the Writ

[Plaintiffs are in the difficult position where they are asking the District Court and Circuit Court which are housed in the Southern District Federal Courthouse to enjoin the construction of a prison adjunct to it. Presumably the project would not have originated without the approval of some members of the residential judiciary].

The decision of the Court of Appeals conflicts with the letter and spirit of NEPA, engrafting a judicial exception to the Act's clearly expressed obligations. This decision conflicts with decisions in other circuits. Further, the scope of NEPA is an important Federal question which should be decided by this Court.

a. An impact statement under §102(2)(C) NEPA should be required.

It is clear that the proposed jail will significantly affect the environment. This is a high-rise 167-foot structure, shoe-horned into a narrow space between massive buildings about 150 feet from nearby residential apartment houses. It will contain not only a detention center and space for convicted prisoners, but also a community treatment program. There will be constant movement of detainees, prisoners and out-patients to and from the site. Besides the Southern District of New York, the jail will serve the Eastern District of New York and the District of New Jersey. The jail will require a considerable number of supportive personnel to run it.

Reason for Granting the Writ

As with all jails, there is the possibility of riots with accompanying havoc to the surrounding area. For example, there is a New York City prison colloquially referred to as the "Tombs" which, within the last couple of years, had had one riot and several punative ones. (New York Times, April 8, 1970, page 1; August 11, 1970, page 1; August 12, 1970, pp. 1, 52; August 13, 1970, pp. 1, 24.)

The people living in the nearby apartment houses will be faced with a permanent view of a jail. Their children will have to play under its shadow within sight of a continuous stream of prisoners, detainees, out-patients, bail bondsmen and hangers-on. The jail will amount to aesthetic pollution. It will damage the environment for present and future generations.

The only street which provides access to the subway will be spanned by two bridges linking the proposed jail and courthouse annex. The already congested traffic problem will be unbearable, particularly since the Government is not providing any on-site parking.

Historical landmarks such as the New York City Municipal Building and St. Andrews Church will be obscured.

The Court of Appeals recognized all of the above factors:

> "The Paduano memorandum does adequately discuss problems of water, heat, sewage

and garbage. But those considerations apply to virtually any building. The memorandum contains no hard look at the peculiar environmental impact of squeezing a jail into a narrow area directly across the street from two large apartment houses. Indeed, there is not even a word about those apartment houses or the others located nearby. If GSA were planning a missile base on that site, a compact discussion of sewage, garbage, water and heat would hardly be adequate. Additional factors would have to be considered, and the same principle holds true here. Plaintiffs claim that the living environment of all the families in this area will be adversely affected by the presence of the jail and by the fears of 'riots and disturbances' so generated. In particular, plaintiffs argue that the city prison formerly located at Sixth Avenue and Eighth Street has been vacated because the noise of the inmates, their demonstration, and the beckoning and signaling between them and their visitors caused disturbances in the neighborhood. The Paduano memorandum contains no hint that such possible disturbances were considered. Nor is there any mention of the potential dangers of housing an out-patient treatment center in this area. Moreover, even as to more routine considerations, there is a conspicuous absence of a thoughtful discussion of possible traffic and parking problems caused by trucks delivering food and supplies, vans taking prisoners to and from the Eastern

> District and New Jersey courts, the need for parking space for prison personnel, and the need to accommodate those visiting the prisoners, whether lawyers or family" (3119-20).

In spite of the above catalogue of environmental consequences of the proposed jail, the Court of Appeals, instead of requiring an environmental study, allowed GSA to make a second determination of whether the jail significantly affected the environment. Such decision engrafts a judicial exception on the duties NEPA requires. Its effect is to allow agencies to excuse their non-compliance with NEPA by bringing themselves under the umbrella of the phrase "significantly affecting the quality of the human environment" (see 42 U.S.C. §4332 [2][C]). A proper study would bring in opposing views. The Government would benefit from this counsel. As stated in Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 422 (2d Cir. 1972):

> "Often individuals and groups can contribute data and insights beyond the expertise of the agency involved."

Congress did not intend that NEPA's requirements should be so easily ignored. The landmark decision of Calvert Cliffs' Coordinating Committee Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971) makes that clear. The court started off its decision as follows:

> "Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.' But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environmental Policy Act of 1969 (NEPA). We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." (449 F.2d at 111; footnotes omitted.)

In Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972), a case which conflicts with the Court of Appeals' decision in our case, the Court granted an injunction pending compliance with NEPA. There the Government was building a highway. Prior to the commencement of the action, most of the planning and preliminary work had been done. Public hearings were held on the location of the project. Buildings in the right-of-way had been acquired, business and families relocated. The court explained the importance of an environmental impact statement:

"Finally, the district court held and appellees claim that the question whether Section 102(C) must be complied with is moot because the Secretary has agreed voluntarily to file an environmental impact statement. We disagree. Filing a report without suspension of work on Arlington I-66 until the report has been considered by the Secretary is not the sort of compliance that is likely to change the result. Section 102(C) contemplates not only that a report be compiled but also that the Secretary take into account the information contained therein in determining the final location and design of a highway" (458 F.2d at 1332).

The statement must be made early enough so that plans could be changed if required:

"Once the highway-planning process has reached these latter stages, flexibility in selecting alternative plans has to a large extent been lost. To paraphrase the District of Columbia Circuit, 'In the language of NEPA, there is likely to be an "irreversible and irretrievable commitment of resources," which will inevitably restrict the [highway officials'] options. Either the [highway planners] will have to undergo a major expense in making alterations in a completed [plan] or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.' [Calvert Cliffs' Coordinating Committee, supra, 449 F.2d at 1128.]" (458 F.2d at 1333-1334.)

Reason for Granting the Writ

The Court concluded:

> "We conclude that the federal statutes invoked by appellants are applicable to Arlington I-66 and must be complied with before further steps may be taken towards construction of this highway. Compliance means not only reconsideration of the proposed location of Arlington I-66 in the light of environmental, social, and economic policies set forth in the statutes; it means also suspension of work on Arlington I-66 pending this reconsideration. Further investment of resources by appellees in the proposed route would render alteration or abandonment of the proposed route increasingly costly and, therefore, increasingly unwise. If appellees were thus allowed to limit their options during their reconsideration of the location of Arlington I-66, reconsideration would be a hollow gesture" (458 F.2d at 1327).

Under NEPA, the Federal Government was required to use all practicable means and measures to protect environmental values (449 F.2d at 1112). The Act's procedural provisions are designed to insure that all Federal agencies do, in fact, undertake to protect the environment. These procedural provisions "are not highly flexible. Indeed, they establish a strict standard of compliance" (449 F.2d at 1112).

> "To ensure that the balancing analysis is carried out and given full effect, Section

> 102(2)(C) requires that responsible officials of all agencies prepare a 'detailed statement' covering the impact of particular actions on the environment, the environmental cost which might be avoided, and alternative measures which might alter the cost-benefit equation. The apparent purpose of the 'detailed statement' is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action" (449 F.2d at 1114).

Describing the court's role in reviewing decision-making under NEPA, Calvert Cliffs stated:

> "But if the decision was reached procedurally without individualized consideration and balancing of environmental factors — conducted fully and in good faith — it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements: 'It is hard to imagine a clearer or stronger mandate to the Courts'" (449 F.2d at 1115). (Footnote omitted.)

In our case, the record clearly showed that the proposed jail did significantly affect the environment. Yet, the court chose to allow GSA to avoid compliance with the Act by providing that GSA could again determine whether its activities would significantly affect the environment.

The phrase "significantly affecting the quality of the human environment" was put in to excuse

minor activities. For example, where the Federal activity was marine maneuvers for three or four days in part of a Maine state park, the court concluded that this activity would not significantly affect the environment. (Citizens for Reid State Park v. Laird, 336 F. Supp. 783 [D. Me. 1972].) But these marine maneuvers were a temporary activity. In our case, the proposed jail will stand for decades.

NEPA explicitly provides that each generation is trustee of the environment for succeeding generations (§4331[b][1]).

It was up to the Court of Appeals to construe the meaning of "significantly affecting the quality of the human environment" and to apply the facts of this case to that definition. Thus, in Natural Resources Defense Council v. Grant, Docket No. 754 (E.D. N.C. March 15, 1972), 3 ERC 1883, the Court granted an injunction against a Federal project on the grounds that no impact statement had been filed. The Court applied the following standard in reviewing the administrative agency's decision:

> "... when the failure to file an impact statement is challenged, it is the Court that must construe the statutory standards of 'major federal action' and 'significantly affecting the quality of the human environment' and having construed this, they apply this to the particular project, and decide whether the agency's failure violates the Congressional Command. See Scherr v.

Volpe, ___ F. Supp. ___, 3 ERC 1588 (W.D. Wis. December 29, 1971)" (3 ERC at 1890).

In Brooks v. Volpe, No. 71-1908, 9th Cir., March 2, 1972, 3 ERC 1858, the Court did not rely on an agency's interpretation of statutory language. Instead, the Court held the meaning of such language was a question of law. In environmental cases, such language should be construed broadly in favor of environmental statements where the environmental impact appears to be a substantial question. (At issue was the word "use" in 23 U.S.C. §138 relating to activities of the Secretary of Transportation affecting park land.)

In other cases, courts have construed activity affecting the quality of the human environment and have then ordered impact statements to be prepared. One such definition was "having an important or meaningful effect, direct or indirect, upon a broad range of aspects of the human environment" (Natural Resources Defense Council v. Grant, supra, 1890).

In Businessmen v. D. C. City Council, (No. 99-72 D.D.C., March 15, 1972, 3 ERC 1906), the Court found that a proposed downtown urban renewal plan which will result in the demolition of existing three or four story structures and construction of multi-story office buildings would permanently alter the character of the downtown area, increase pedestrian and vehicular traffic, parking and public transportation needs all of which will have an impact on the environ-

ment. The Court consequently ordered the preparation of an environmental impact statement.

In Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) the court ordered the Federal Government to prepare an environmental impact statement. The court noted that such statements are not required unless the conditions of §102(2)(C) are present. However, the court determined for itself that these conditions were present.

The facts of Ely are analagous to our case. In Ely, the proposed activity was the construction of a state penal facility using Federal funds in a rural area containing some historical places. Actually our case is stronger because there is much more congestion at the place where the Government proposes to build its new jail than in the Ely case.

Governmental regulations applying NEPA also require an impact statement for a case such as ours. Thus, the Council on Environmental Quality Guidelines states: "Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases" (36 F. Reg. 7724 [1971]).

GSA's own regulations mandate an environmental impact statement. They state in part:

> "b. Identifying agency actions requiring environmental statements. As a general principle the responsible official shall provide environmental statements when he concludes

> that a Federal action will have a significant (by itself or cumulatively) impact on the environment. Dollar value alone is not a sufficient indicator; a small repair and improvement project may have significant impact on the environment. Actions requiring environmental statements will include but not be limited to:
>
> * * *
>
> (2) Prospectuses to the Congress requesting authority to proceed with a project by purchase, lease, or construction" (PBS order 1095.1, 3[b]). (Reproduced at 27a.)

Thus, by their own regulations, an impact statement was required.

Similarly, Sec. 102(2)(C) is not qualified just by the phrase "significantly affecting the quality of the human environment." An impact statement is required to be included in "every recommendation or report on proposals for legislation." No impact statement was prepared before legislation was obtained authorizing construction of the jail.

Our case is an especially clear one for GSA to have been required to produce an environmental impact statement and separately undertake the other procedures of Section 102(2(C). The Court of Appeals held that it was arbitrary and capricious for GSA to decide that the jail did not significantly affect the environment. Since GSA was so definitely wrong in its decision, it should not have been given another chance to determine for itself whether an environmental impact statement was needed.

Reason for Granting the Writ

The futility of the Court of Appeals' decision is underscored by the fact that GSA did again determine that the proposed jail would not significantly affect the quality of the human environment. This statement, filed June 15, 1972, is patently defective. It was made without adequate factual investigation. It contains obviously incorrect factual matters. It has been tailored to try to fit the Court of Appeals' decision.

GSA's statement contains a generally poor analysis and conclusions based on erroneous facts.

Thus, the buildings will add to traffic congestion. The area is already congested. There is not enough parking presently. The Government is making, by their own admission, provision for only seven more cars.

GSA's statement grossly underestimates the number of visitors to this jail. Furthermore, the increase in courtroom space resulting from the office building will increase the number of people coming into the area.

The jail will not enhance the area. No matter what GSA says, the building still looks like a jail. Furthermore, there is no indication that the jail was planned using any of the knowledge in the possession of modern penologists. There are minimal recreational and medical facilities. Only a small approximately eight-by-ten room has been provided for each prisoner.

Reason for Granting the Writ

GSA claims the necessity for having the jail next to the courthouse it serves. No specific reasons are given for this policy. Furthermore, in this case, proximity is irrelevant since the jail is going to serve the Eastern District of New York and the District of New Jersey.

GSA claims the Government is improving the area. However, the buildings on the site were scheduled to be torn down by the City anyway. The park or plaza GSA refers to is being built by the City, not the Federal Government.

GSA has tailored its determination to the Court of Appeals' decision. Thus, various alternative sites are set forth. Yet, there is no discussion explaining why these sites could not be used instead of the present site. GSA claims that intensive investigation preceded choosing the present site. No specifics of that investigation are given.

GSA claims no undue notice or disturbances are expected in the jail. This conclusion is based on what allegedly happened at the Old Federal House of Detention on West Street. However, the proposed jail will have more prisoners and will be in a very central, highly visible location. Both factors will cause many more disturbances. Furthermore, if recent history is a guide, disturbances inside and outside all jails will increase in the future.

GSA's determination was put together with a general lack of care. Large amounts of text are copied verbatim from the Paduano affidavit submitted by GSA in opposition to plaintiffs' original motion.

Reason for Granting the Writ

Throughout this whole new assessment, there is little which deals with the basic question of the full range of the jail's potential affects on the residential community. In other words, how will a jail, about one hundred and fifty feet away from two large apartment houses, affect the residents in their daily activities? Nothing is said about how the proposed jail will affect the residents of Chinatown. That community, in the past, has been subject to seiges of terror resulting from riots in the Tombs three or four blocks away. The new prison will just add to their problems. The man making the report never visited the residential buildings to observe them and their owners. He never talked to any of their inhabitants.

GSA's assessment is a series of conclusions. GSA does not attach any proof in the nature of documents, plans, studies or other evidence supporting these conclusions.

Thus, as the proposed jail will significantly affect the quality of the human environment, GSA should have been required to stop construction and prepare an environmental impact statement and fulfill the other procedures of §102(2)(C).

b. Other NEPA provisions should be complied with irrespective of whether the proposed jail significantly affects the quality of the human environment. All federal agencies involved should comply with NEPA.

NEPA's other provisions must be observed in all cases. Observation of these provisions does not depend on whether the proposed activity will have a significant effect on the environment. In this case, the respondents did not comply with the duty to utilize an interdisciplinary approach which insures the use of the "natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment" (§4332[2][A]).

This is a requirement independent of the detailed impact statement and at the very least would have required consultation with the Council on Environmental Quality, the Advisory Council on History Preservation, the Department of Health and the Environmental Protection Agency (see CEQ guidelines, par. 7, 36 Fed. Reg. 7224-7229). It would surely have required conferences with the City Landmarks Commission since the Municipal Building is a designated landmark; the local planning board; architects or architectural organizations (other than the architect lucky enough to be retained); business and citizen groups in the area and a multitude of others.

Paragraph A (§4332[2][A]) does not only apply where there is a "major federal action significantly affecting the quality of the human environment."

The requirements of Paragraph A must be performed before, not after, the work is engaged upon.

Paragraph B (§4332[2][B]) which also lacks any statement that it shall be restricted to "major federal actions significantly, etc." requires each agency, in consultation with CEQ, [Council on Environmental Quality] to develop methods and procedures insuring that environmental amenities and values will be given appropriate consideration in decision-making. The record shows no such performance on the part of any of the three Federal agencies involved in this case.

GSA has no rules governing what its officials should consider when they are determining whether a proposed activity significantly affects the environment. Thus, GSA did not conduct any surveys of the residents in the area of the proposed jail. GSA did not find out how many children and unprotected women would have to walk past the new jail on the dark street on their way to the subway.

GSA failed to consider the psychological effects on the residents of that neighborhood. Apparently, there was no rule requiring such consideration. Yet, NEPA requires that there be methods and procedures to insure that Federal agencies consider environmental amenities and evaluations in making decisions.

Paragraph D (§4332[2][D]) also independent of the qualification "major federal actions significantly, etc." compels all agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative use of available resources."

Reason for Granting the Writ

The agency files, insofar as they were exposed to the court below, are completely blank with respect to alternatives, except for Paduano's post hoc affidavit to the effect that GSA and the Department of Justice made "extensive investigation" (3a), the nature and extent of which is undisclosed.

None of the Federal agencies involved really considered alternatives. There is never a discussion of the reasons that the jail must be built right next to the courthouse. The claim that the jail must be in close proximity to the courthouse is never supported. Since the jail services the Brooklyn and Newark Court, too, the claim would in any event be unjustified.

An idea of what really is required to appear in the department files can be gathered from paragraph 6 (iv) of the CEQ guidelines which says:

> "Alternatives to the proposed action. Section 102(2)(D) of the Act requires the responsible agency to 'study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.' A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the

proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects" (36 F.R. 7724).

The procedural provisions of NEPA "are not highly flexible. Indeed, they establish a strict standard of compliance" (Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, supra, 449 F.2d at 1112).

In considering alternatives to the activity, it was up to the governmental agencies involved to consider whether the jail as it was going to be built on the proposed site is consistent with good penology. In other words, the Government was required to consider whether they were compromising certain standards for a modern jail in order to be able to squeeze the proposed jail into the narrow plot in back of the Federal Courthouse.

The proposed jail will have minimal recreational, medical and educational facilities. It is admitted by the Government that prisoners will have to use the already overcrowded local hospitals for major medical requirements.

One study pointed out that detention centers must be well-equipped and well-staffed and provide programs of counselling and education. Furthermore, these short-term institutions should be small, ideally less than 100 in population, but not exceeding 200. (National Council on Crime and Delinquency, Correction in the United States [1966], pp. 153-154.)

By contrast, the proposed jail will have 449 prisoners and will not have the quality of facilities contemplated by the study just quoted. Apparently, there has been compromise in order to place the prison on a site which is unsuited for it.

The Court of Appeals held that GSA was the only Federal agency which had to determine whether to file an Environmental Impact Statement. However, NEPA makes environmental protection a part of the mandate of every Federal agency and department. (See Calvert Cliffs, supra, at 1112.) Section 102(2) of NEPA clearly provides that all agencies shall comply with NEPA's provisions. In the present case, the Bureau of Prisons and Department of Justice did nothing. Their lack of activity is completely contrary to NEPA's policy of requiring all available expertise to be used to discover and solve environmental problems of proposed actions.

The Bureau of Prisons is knowledgeable about the management of prisons. There is no evidence that the Bureau ever shared their knowledge with the other agencies in this case. Nothing in the record below indicates what contribution, if any, the Bureau made to the proposal to construct the jail.

The Attorney General and Department of Justice did nothing to protect the environment either. However, the Attorney General is responsible for selecting the site of a proposed jail and obtaining appropriations from Congress to construct it. (See 18 U.S.C. §4003, and §4009.)

Reason for Granting the Writ

Section 4009 requires the Attorney General to submit to Congress an estimate of the cost of the site and the cost of construction before an appropriation will be made. It has never been adequately explained how the Attorney General, who has such large responsibility for construction of the jail, was able to avoid any of NEPA's requirements.

The President, in Executive Order No. 11514, 35 Fed. Reg. 4247, directed that each Federal agency, consistent with NEPA provisions, must monitor, evaluate and control their activities so as to protect and enhance the quality of the environment. These agencies must also insure that the public is informed of all plans and programs with environmental impact. Public hearings should be held in order to obtain the view of all interested parties. Each agency must cooperate with other agencies in order to further NEPA's purposes. None of these requirements were followed by the respondents.

Generally, the Court of Appeals has narrowed NEPA's effect. Such narrowing is contrary to the preliminary language of the statute. Congress, there, stated that the Federal Government was required, "to use all practicable means and measures" to protect environmental values (Sec. 101). Congress also stated that each generation was a trustee for the environment of succeeding generations (Sec. 101).

In Calvert Cliffs, supra, the Court stated, "Congress did not intend the act to be ... a paper tiger" (449 F.2d at 1114).

Reason for Granting the Writ

The Court of Appeals has ignored the strong language of NEPA. The clear intent of Congress has been violated. As it stands now, the residents of the area in back of the Federal Courthouse will have their environment ruined. It remains up to this Court to enforce NEPA with all vigor.

It is necessary for the Supreme Court to consider this case now and grant a stay pending compliance with NEPA. Unless a stay is granted now, all future relief will be illusory because the jail will be well on its way to completion, and it will be impossible to turn back. (See Arlington Coalition on Transportation v. Volpe, supra, 458 F.2d at 1334.)

Conclusion

A Writ of Certiorari should issue and the Order of the Second Circuit should be reversed.

Respectively submitted,

s/ Alfred S. Julien
ALFRED S. JULIEN
Attorney for Petitioners

ALFRED S. JULIEN
JESSE A. EPSTEIN
Of Counsel

August 8, 1972.

APPENDIX

Opinion of the Court of Appeals
May 17, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 791—September Term, 1971.

(Argued April 18, 1972 Decided May 17, 1972.)

Docket No. 72-1354

DENIS HANLY, SIEN WEI LIU, IRVING ZUCKERMAN, FRANK MOSCO, COVELLE N. BURBANK, DENNIS SULLIVAN, and MARIE BEAULIEU on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—against—

JOHN M. MITCHELL, as Attorney General of the United States, ROBERT L. KUNZIG, as Administrator of General Services of the United States, NORMAN A. CARLSON, as Director of Federal Bureau of Prisons and UNITED STATES OF AMERICA,

Defendants-Appellees.

Before:

WATERMAN, HAYS and FEINBERG,

Circuit Judges.

Appeal from order of the United States District Court for the Southern District of New York, Charles H. Tenney, *J.*, denying preliminary injunctive relief in suit brought to enforce compliance with the National Environmental Policy Act, 42 U.S.C. §4331 et seq.

Affirmed in part and reversed in part.

ALFRED S. JULIEN, New York, N. Y. (Julien, Glaser, Blitz & Schlesinger, Jesse A. Epstein, on the brief), *for Plaintiffs-Appellants.*

MILTON SHERMAN, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Michael D. Hess, Assistant United States Attorney, on the brief), *for Defendants-Appellees.*

FEINBERG, *Circuit Judge*:

This case raises important issues under the National Environmental Policy Act of 1969, 42 U.S.C. §4331 et seq., a statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing. Thus, the Act recognizes "the profound influences of . . . high-density urbanization . . . [and] the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," and declares it the "continuing responsibility of the Federal Government to use all practical means . . . to . . . assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings." To achieve that and similar objectives, the Act sets up a system of procedures for federal agencies to follow in making decisions that might have an impact on the environment. The basic issue before us is whether the Act was complied with in the planning for a nine-story federal jail in back of the United States Court House in Manhattan, just across the street from two large apartment buildings. Plaintiffs, who include some owners of these apartments, allege that defendants violated the Act. Excavation

on the project began in mid-February 1972, and a short time later plaintiffs sought a preliminary injunction in the United States District Court for the Southern District of New York against further construction work. On March 17, 1972, Judge Charles H. Tenney denied the injunction. Since the matter was urgent, we expedited the appeal. Because we believe that defendants have failed to comply adequately with the Act, we reverse in part the order of the district court.

I

Plaintiffs, including Reverend Denis Hanly, Pastor of Transfiguration Church, 29 Mott Street, sue for themselves and on behalf of a class of "residents, merchants, businessmen, institutions, religious organizations and other members of the public living within the area." Plaintiffs are all members of the Chatham Square Civic Committee for a Planned Community, a non-profit group concerned with the development and protection of that portion of lower Manhattan called the Civic Center. Although that area contains many government buildings, including several courthouses, surprisingly at least 50,000 people live there and in adjacent Chinatown. Included in that group are over 3,000 persons living in approximately 660 cooperative apartments in two buildings called Chatham Towers and Chatham Green. These directly face the proposed new jail, some 100-150 feet away. The apartments, constructed in the last decade, have many individual terraces, and there are lawns and play areas around the buildings.

The principal defendant is the United States; plaintiffs have also joined as defendants John M. Mitchell, as Attorney General,[1] Robert L. Kunzig, as Administrator of

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1 Mr. Mitchell is no longer Attorney General. But see Fed. R. Civ. P. 25(d)(1).

General Services and Norman A. Carlson, as Director of the Federal Bureau of Prisons. The proposed construction is called the Foley Square Courthouse Annex, but it actually consists of two nine-story buildings.[2] One, on the southerly portion of the site, will be a conventional office building containing about 127,000 square feet of interior space. It will house the relocated offices of the United States Attorney and the United States Marshal for the Southern District of New York and the Joint Strike Force Against Organized Crime. The other building, on the northerly portion of the site, will contain about 200,000 square feet and will be the Metropolitan Correction Center (MCC). Although plaintiffs formally attack the entire project, this building draws most of their fire. The MCC is designed to provide modern detention facilities for 449 prisoners, including an infirmary, a diagnostic center for psychiatric problems and a community treatment center for outpatients as well as inmates. Since the MCC is intended to replace the overcrowded and inadequate Federal Detention Center now located at West Street in Manhattan, it is probable that the new building will service not only prisoners involved in prosecutions in the Southern District but also prisoners from the Eastern District, and perhaps from New Jersey.

Plaintiffs seek to enjoin defendants from proceeding further with excavation and construction of both buildings and also pray for money damages. This appeal, however, concerns only the denial of preliminary injunctive relief. The theory of plaintiffs' complaint is that defendants were required by the National Environmental Policy Act to take certain preliminary steps before beginning excavation and construction and that they did not do so. Judge Tenney held that the General Services Administration (GSA)

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2 Plaintiffs claim that at least one building will actually be 11 stories, but we do not regard that factual issue as significant on this appeal.

had considered "all of the environmental factors relevant to the construction of the Annex," and that GSA's conclusion that the Annex "will not have a significant adverse impact on the environment" was "not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." Judge Tenney further concluded that plaintiffs did not demonstrate a likelihood of success on the merits or irreparable harm if the injunction was not issued and that the balance of equities rested with defendants.[3] From those ruling plaintiffs appeal.

II

Plaintiffs properly disclaim any attempt to argue before us the merits of the proposed building project. They concede that the question on appeal is not whether the proposed buildings adjoining this Court House should be built, but whether the requirements of the National Environmental Policy Act have been met. In their complaint and in the district court, plaintiffs' main argument was that defendants have not complied with section 102(2)(C) of the Act, 42 U.S.C. §4332(2)(C), which provides:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
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> • • •
>
> (C) include in every recommendation or report on proposals for legislation and *other major Federal actions significantly affecting the quality of the human environment*, a detailed statement by the responsible official on—

3 Unpublished memorandum dated March 17, 1971, at 13.

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; [Emphasis added.]

Although this and other sections of the National Environmental Policy Act are innovative and place new and unusual responsibilities on government agencies, the legal questions before us fall into a familiar administrative law framework. We must identify the agency action to be reviewed, determine the applicable standard of review, and decide whether it has been met.

The agency determination under attack is the alleged conclusion of a "responsible . . . official" of GSA that under the italicized language quoted above, there was no need to make an "environmental impact" statement. Defendants argue that section 102(2)(C) requires such impact statements only when there are "major Federal actions significantly affecting the quality of the human environment." In the district court, defendants first claimed that building the Courthouse Annex was not a "major" federal action, even though it involved two nine-story buildings and an expenditure of over $20,000,000. Later in the proceeding before Judge Tenney, however, defendants conceded that the federal action was major, but argued that it would not "significantly [affect] . . . the quality of the human environment," and that therefore no environmental impact statement was necessary. This position is crucial to defendants' case because they concede, and the district judge pointed out, that no detailed environmental impact statement by a responsible official has been made pursuant to section 102(2)(C). However, Judge Tenney held that defendants' conclusion that there was no need for such a statement was justified.

There is no doubt that the Act contemplates some agency action that does not require an impact statement because the action is minor and has so little effect on the environment as to be insignificant. See *Citizens for Reid State Park* v. *Laird*, 336 F. Supp. 783 (D. Maine 1972); *Echo Park Residents Comm.* v. *Romney*, 3 E.R.C. 1255 (C.D. Cal. May 11, 1971). There is, however, a further question of statutory construction. Plaintiffs argue that if a federal action is "major," as defendants now concede this one is, it must have a "significant" effect on the environment and call for an impact statement. Defendants claim that the term "major Federal action" refers to the cost of the project, the amount of planning that preceded it, and the

time required to complete it, but does not refer to the impact of the project on the environment. We agree with defendants that the two concepts are different and that the responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary. See S. Rep. No. 91-296, 91st Cong., 1st Sess. 20 (1969). See *Natural Resources Defense Council, Inc.* v. *Grant*, —— F. Supp. —— (E.D. N.C. Mar. 15, 1972); *Citizens for Reid State Park, supra*, 336 F. Supp. at 789. We also agree that, contrary to plaintiffs' contention, the responsible agency here was GSA, not the Department of Justice or the Bureau of Prisons, for whose use the office building and new jail will be built. As the agency responsible for the acquisition of the site, the design and construction of the buildings, and their ultimate operation, GSA was the appropriate body to make the original determination as to environmental impact.

Plaintiffs also claim that GSA concluded not that an impact statement was unnecessary, but that it was necessary, and that GSA thereafter fell short of meeting that obligation. This argument is primarily based on the use of the words "Environmental Statement" in the heading of the document GSA relies upon. Plaintiffs assert that GSA's changed position that an impact statement was not necessary came only after GSA's belated recognition that its memorandum would not be sufficient for such a statement. Although we have grave reservations about the thoroughness with which that document was prepared, we do not agree that defendants are, in effect, estopped from now arguing that no detailed impact statement was necessary. Of course, any written consideration of environmental impact can loosely be called an impact statement, or a mini-impact statement, but use of particular words cannot be determinative. The issue in this context is whether GSA decided that the full statement called for by

section 102(2)(C) was unnecessary. We agree that GSA did so decide; whether that decision withstands attack is another matter, to which we now turn.

III

GSA's entire determination regarding the Courthouse Annex—including both office building and jail—is found principally in a memorandum dated February 23, 1971, of George M. Paduano, who was then Regional Director of the Public Buildings Service of GSA,[4] and, according to defendants, the proper official to make such a decision under GSA's regulations.[5] See GSA Order PBS 1095.1 issued to implement section 102(2)(C) of the National Environmental Policy Act. Since the memorandum is short and crucial to the decision on this appeal, we quote it in full:

> FEB 23 1971
>
> Assistant Commissioner,
> Operational Planning—16
>
> 2PRR
>
> Application of the National Environmental Policy Act of 1969 Relative to Foley Square Courthouse Annex—Project No. 31-0323
>
> *Environmental Statement:*
>
> In accordance with GSA Order PBS 1095.1 dated December 11, 1970 and in response to telephone request

4 Mr. Paduano is now Executive Assistant to the Regional Administrator, GSA, Region 2.

5 The other memorandum, by Commissioner A.F. Sampson, Public Buildings Service, dated April 29, 1971, also concluded that the Courthouse Annex was not "a major Federal action significantly affecting the quality of the human environment." This memorandum admittedly refers only to the proposed office building for the staff of the United States Attorney and others, and not to the jail.

from your office on February 16, 1971 the following information is furnished in connection with the subject project:

The impact of the proposed action will have no adverse effects on the environment, including ecological systems, population distribution, transportation, water or air pollution, nor will it be any threat to health or life systems or urban congestion. These points are further amplified as follows:

1. It is our intention to connect with the existing New York utility services, including water supply, sewage disposal, solid waste disposal, storm water drainage, etc.

2. It is planned that the heating will be by purchase steam from Con Edison Company of New York (same as 26 Federal Plaza).

3. Trash removal will be by commercial contract.

4. There will be no relocation of people involved as the proposed project is adjacent to the Foley Square Courthouse and only a short additional traveling distance by public transportation from the present Bureau of Prisons location at 427 West Street.

5. There will be no material impact at all on public transportation.

6. Number of people to be housed in the Bureau of Prisons operation is given as 405.[6]

7. Zoning—C6-1.

8. We intend to follow the existing zoning regulations.

(Signed) G. M. PADUANO

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6 Defendants concede that this figure is too low.

G.M. PADUANO
Regional Director

cc: Official File—2PRU
Reading

INFO COPY: S. Bolen
Project Coordinator . . . .

This document is terse, to say the least. Nonetheless, for the purpose of supporting GSA's determination that the proposed office building portion of the Courthouse Annex will have "no adverse effects on the environment," we believe, as did the district judge, that the document is sufficient. True, the memorandum fails to mention aesthetic and architectural considerations, but in a neigborhood such as this with public buildings of wildly varying architecture, we cannot say that failure to mention explicitly such considerations is a vital flaw. Further, as the Sampson memorandum makes clear, see note 5 *supra*, "The building will house 357 people, most of whom are already employed in the same general area." At the same time, the space vacated by the United States Attorney in this Court House will apparently be used principally for courtrooms, not for additional offices. Finally, the area is already characterized by government buildings, including several courthouses and office buildings.[7] Thus, whatever the theoretical environmental impact of a nine-story office building may be, in this case the actual impact appears to be minimal and adequately accounted for in the Paduano memorandum.

The proposed jail, however, stands on a different footing. The Paduano memorandum does adequately discuss problems of water, heat, sewage and garbage. But those considerations apply to virtually any building. The memorandum contains no hard look at the peculiar environmental impact of squeezing a jail into a narrow area di-

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7 Defendants stress on appeal "the general character of the area as the nerve-center of the Federal, State, and City governments. . . ."

rectly across the street from two large apartment houses. Indeed, there is not even a word about those apartment houses or the others located nearby. If GSA were planning a missile base on that site, a compact discussion of sewage, garbage, water and heat would hardly be adequate. Additional factors would have to be considered, and the same principle holds true here. Plaintiffs claim that the living environment of all the families in this area will be adversely affected by the presence of the jail and by the fears of "riots and disturbances" so generated. In particular, plaintiffs argue that the city prison formerly located at Sixth Avenue and Eighth Street has been vacated because the noise of the inmates, their demonstrations, and the beckoning and signaling between them and their visitors caused disturbances in the neighborhood. The Paduano memorandum contains no hint that such possible disturbances were considered. Nor is there any mention of the potential dangers of housing an out-patient treatment center in this area. Moreover, even as to more routine considerations, there is a conspicuous absence of a thoughtful discussion of possible traffic and parking problems caused by trucks delivering food and supplies, vans taking prisoners to and from the Eastern District and New Jersey courts, the need for parking space for prison personnel, and the need to accommodate those visiting the prisoners, whether lawyers or family.

Defendants argue to us that these are not "environmental considerations, as they are defined in" the Act and that the injuries plaintiffs envision are speculative at best. As to the latter point, it may be that some of plaintiffs' fears are vague and speculative, but clearly all of them are not and the "responsible official" of GSA has apparently never considered any of them. As to defendants' argument that plaintiffs' concerns are irrelevant under the Act, this

assertion, characterized most charitably, is simply incorrect. The National Environmental Policy Act contains no exhaustive list of so-called "environmental considerations," but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. *See Ely* v. *Velde,* 451 F.2d 1130 (4th Cir. 1971); *Goose Hollow Foothills League* v. *Romney,* 334 F. Supp. 877 (D. Ore. 1971). The Act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban "environment" and are surely results of the "profound influences of . . . high-density urbanization [and] industrial expansion." Section 101(a) of the Act, 42 U.S.C. §4331(a). Thus, plaintiffs do raise many "environmental considerations" that should not be ignored. We believe the record in this case indicates that, as to the proposed jail, they were.

It is true that the Paduano memorandum states that "the impact of the proposed action will have no adverse effects on the environment, including . . . transportation, . . . nor will it be any threat to health or life systems or urban congestion." But in the context of an act designed to require federal agencies to affirmatively develop a reviewable environmental record, this perfunctory and conclusory language simply does not suffice, even for purposes of a threshold section 102(2)(C) determination. Cf. *Greene County Planning Bd.* v. *FPC,* 455 F.2d 412, 420 (2d Cir. 1972); *City of New York* v. *United States,* 337 F. Supp. 150, 159 (E.D.N.Y. 1972) (3-judge court) (Friendly, *C.J.*). Nor does the February 1972 affidavit of Mr. Paduano submitted in this litigation make up for the deficiencies in his original memorandum. The 1972 affidavit still fails even to mention the residential community abutting the Annex

site or to deal realistically with the full range of the jail's potential effects on that community. Moreover, the affidavit itself reflects much superficial reasoning. For example, the only support for the affiant's conclusion that the completed jail will not increase the burden on present public transportation facilities is the statement that the "approximately 450 residents" of the jail "obviously will not increase the burden on . . . public transportation." But plainly, the inmates will not govern themselves, nor will they cook their own meals or attend to the prison's administrative details. Others will do that and most will, presumably, come and go each day.

We hasten to point out that we do not suggest plaintiffs are correct in claiming that the jail requires a section 102(2)(C) impact statement. The area in back of the Court House may not be a residential area in the usual sense[8] and the entire Courthouse Annex may actually be an improvement in the area—jail and all.[9] Also, GSA is obviously not required to give the same weight to plaintiffs' concerns as plaintiffs do. But the essential point is that GSA must actually consider them. See generally *Calvert Cliffs' Coordinating Comm., Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Greene County Planning Bd.* v. *FPC*, *supra*.

Having come this far, we are aware that we have not yet considered one of the issues we noted at the outset of this discussion: the proper scope of judicial review of the agency action. Defendants argue that our only task is to see whether the agency determination was arbitrary or capricious or an abuse of discretion, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971)

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8 See note 7 *supra*.

9 The district judge found that the buildings formerly on the site were "eyesores" at best.

Goose Hollow Foothills League v. *Romney, supra;* and *Echo Park Residents Comm.* v. *Romney, supra.* Plaintiffs contend that the standard of review is more "liberal" in some ill-defined way, citing *Natural Resources Defense Council, Inc.* v. *Morton,* —— F.2d —— (D.C. Cir. Jan. 13, 1972); *Lathan* v. *Volpe,* —— F.2d —— (9th Cir. 1971) (3 ELR 1362); *Natural Resources Defense Council, Inc.* v. *Grant, supra; Scherr* v. *Volpe,* 336 F. Supp. 886 (W.D. Wis. 1971). We see no need to enter the controversy at this stage.[10] See *Scenic Hudson Preservation Conference* v. *FPC(II),* 453 F.2d 463, 467-69 (2d Cir. 1971). Even under the more limited test, we would reverse as to the proposed jail because it is "arbitrary or capricious" for an agency not to take into account all relevant factors in making its determination. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 416. Similarly, even under a more "liberal" test, we would affirm as to the proposed office building.

Accordingly, we affirm in part and reverse in part the district court order denying a preliminary injunction and remand the case for further consideration. Plaintiffs are entitled to a preliminary injunction against further construction of the proposed jail until such time as GSA has made a proper determination under section 102(2)(C), taking account of all relevant factors, of whether the proposed jail significantly affects the quality of the human environment. We do not agree with plaintiffs that GSA is barred from making that necessary preliminary determination now. Nor do we regard the remand as pure ritual because of the probability that GSA will reach the same conclusion as before. Preservation of "the integrity" of

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10 After finding that the determinations of Mr. Paduano and Mr. Sampson were not arbitrary or an abuse of discretion, the district court went on to say:

> While it is an unnecessary finding, it would even appear that there is substantial evidence to support their conclusion.

the new Act is an important consideration, see *City of New York* v. *United States, supra,* 337 F. Supp. at 160, lest the Act's "lofty declarations" amount to no more than that.[11] Moreover, we assume that the determination will be made in good faith after full consideration. If GSA again decides that no formal environmental impact statement is required because the quality of the human environment will not be significantly affected, the district court can review the question again. *Cf. Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U.S. at 420. Should GSA decide that a formal impact statement is necessary, then the detailed procedures set forth in section 102(2)(C) will have to be followed. In any event, because of the urgency of the situation and the district court's finding on the balance of hardships, we suggest that the injunctive order be stayed for a short period of time, but no more than 30 days, to allow the necessary threshhold determination of the jail's environmental impact to be made while the preliminary work on the construction site continues. *Cf. City of New York* v. *United States, supra,* 337 F. Supp. at 163-65; *Goose Hollow Foothills League* v. *Volpe, supra,* 334 F. Supp. at 880.

IV

Plaintiffs also argue that defendants failed to comply with subsections (A), (B) and (D) of section 102(2) of the Act, 42 U.S.C. §4332(2)(A), (B), (D), and point out that these sections do not contain the same limiting language of subsection (C) discussed above. According to plaintiffs, therefore, defendants were required to comply with these sections whether or not the proposed federal action had a significant effect on the environment. Defen-

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11 Statement of the Act's principal sponsor, quoted in *Calvert Cliffs' Coordinating Comm., Inc.* v. *AEC, supra,* 449 F.2d at 1113 & n. 7.

dants maintain that plaintiffs did not raise these issues in the district court and that, in any event, the requirements of these sections were satisfied. The district court did not deal with these questions, obviously because they were not seriously pressed below. Although the papers submitted to us by defendants on this issue are persuasive, we believe that the better procedure, in view of our remand, is for the district court to decide whether these sections are applicable and, if so, whether defendants met their requirements.

Judgment affirmed in part and reversed in part. Case remanded for further expeditious proceedings consistent with this opinion. The mandate shall issue forthwith.

Order of the District Court, May 23, 1972 Pursuant to Court of Appeals' Decision

72 Civ. 716

[Same Title]

The plaintiffs having moved this Court for an order granting a preliminary injunction enjoining the defendants from proceeding with the construction of the Metropolitan Correction Center and the United States Attorney's Office, the two buildings which constitute the Courthouse Annex project, and this Court having denied the plaintiffs' motion in a decision and order dated March 17, 1972, and the plaintiffs having appealed from the order to the United States Court of Appeals for the Second Circuit, and the Court of Appeals having rendered a decision on May 17, 1972, affirming in part and reversing in part the order of this Court, and the Court of Appeals having remanded the action to this Court for further expenditious proceedings consistent with its decision, it is hereby

ORDERED that during the pendency of this action until such time as the General Services Administration files with this Court a determination pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. §4332(2)(C), as to whether the proposed Metropolitan Correction Center significantly affects the quality of the human environment, within the meaning of the foregoing statute, the defendants are enjoined from proceeding with the construction of the Metropolitan Correction Cen-

ter; provided, however, that the preliminary injunction herein contained shall in no event take effect before June 22, 1972, and preliminary work on the construction site may proceed until said date; and it is further

ORDERED that the plaintiffs shall have ten (10) days from the day on which the aforesaid determination pursuant to section 102(2)(C) of the National Environmental Policy Act has been filed with this Court (on which day a copy of the determination shall be served on the attorneys for the plaintiffs) to seek review thereof.

Dated: New York, New York
May 23, 1972

s/ Charles H. Tenney
U.S.D.J.

Opinion of the District Court, March 17, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed March 22, 1972]

[Same Title]

TENNEY, J.

By order to show cause filed February 18, 1972, plaintiffs seek a preliminary injunction enjoining further excavation and construction on a site of land located directly behind this court-

house. The named plaintiffs are all residents of the "Civic Center" area of New York City and purport to bring the action on behalf of a class of persons consisting of all of the "residents, merchants, businessmen, institutions, religious organizations and other members of the public living within the area" surrounding the construction site "who have sustained economic losses and damages as a result of defendants' wrongful acts." The defendants are sued as the federal officials responsible for the approval of construction, maintenance and operation of the "Courthouse Annex" to be erected on the site in question. By their complaint plaintiffs contend that the Courthouse Annex is a major federal action significantly affecting the quality of the human environment thus requiring the defendants to take certain preliminary steps before beginning the construction. Those steps are specified in the National Environmental Policy Act of 1969, section 102(2)(C), 42 U.S.C. §4332(C) (1972) ("NEPA").[1] It must be conceded that the defendants have not prepared the detailed environmental statement nor have they taken the other steps called for by section 102(2)(C). On the contrary, the defendants argue that the environmental-impact statement was not required in this case because, although the Annex is a major federal action within the meaning of the statute, it does not significantly affect the quality of the human environment, which finding they contend is a condition precedent to any requirement to prepare a 102(2)(C) statement.

Opinion

As already indicated the Annex is to be constructed on a now open site in the rear of the U.S. Courthouse. The construction site contains 51,340 square feet and is bound by Park Row on the east, Pearl Street on the north, Cardinal Hayes Place on the west, and Duane Street on the south and lies in an area of the city that is generally regarded as the Civic Center. The Annex will consist of two nine story buildings containing a total of approximately 327,000 square feet of space. One of the buildings will house the U.S. Attorney's Office for the Southern District of New York, the United States Marshal for this district and the Joint Strike Force Against Organized Crime. It will be a conventional office building containing approximately 127,000 square feet of space and will be constructed on the southerly portion of the site. The second building and the one that is apparently at the heart of the present controversy will be the Metropolitan Correction Center ("MCC"), which will be constructed on the northerly portion of the site, and will contain approximately 200,000 square feet of space.

The MCC will replace the existing Federal Detention Center at West Street and will house persons awaiting trial in this court and those convicted of short term offenses. Housing, services, and activities in the MCC will be decentralized into functional units with each unit occupying one floor of the building and consisting of 48 single rooms. Each unit will have its own facilities for recreation, religious worship, group therapy and educational programs. Food will be prepared in a central kitchen but served within each unit. The MCC will also have its

own infirmary with medical and dental facilities, a diagnostic center providing psychiatric and psychological services, and a community treatment center for the residents of the MCC and for outpatients. The MCC will be able to accommodate up to 449 persons.

In seeking the injunction, the plaintiffs have argued that the construction of the Annex and particularly the MCC in an area with approximately 660 cooperative apartments, housing some 3,000 people, will destroy the environmental quality of the community and will destroy the character of the Civic Center. Plaintiffs further contend that the defendants made no environmental study before approving the Annex, did not check with state or local officials, gave plaintiffs no notice of the construction, the Annex is contrary to the City of New York Planning Commission Master Plan for the Civic Center,[2] the Annex will increase traffic congestion in the area, and that the defendants gave no consideration to aesthetics in approving the Annex. Finally, plaintiffs assert that the MCC creates the possibility of "riots" and the presence of the MCC in the area will decrease property values. While plaintiffs have provided this Court with a long list of "reasons" why the Annex will have a significant adverse environmental impact on the Civic Center, their reasons are based on either misinformation, sheer speculation, are not supported by the facts or are not legitimate environmental factors.

Opinion

George M. Paduano, presently Executive Assistant to the Regional Administrator, General Services Administration, Region 2, was Regional Director, Public Services Administration, GSA prior to November 15, 1971 and as such was responsible for the design and construction of the Annex as well as the acquisition of the building site and for determining whether the Annex would significantly affect the environment. GSA Order, PBS 1095.1 §3. In his affidavit of February 23, 1972 Mr. Paduano states that the present site of the Annex was selected after extensive investigations by the Department of Justice and GSA and that because of the function of the Annex it was necessary that it be located in the immediate vicinity of the Courthouse and the present site was the only one available. In late 1970, the GSA began negotiations with the City of New York which owned the site at the time. During the negotiations GSA agreed that the exterior of the Annex would blend with that of the existing buildings in the area, that suggestions as to design would be solicited from the Office of Lower Manhattan Development ("OLMD"), the branch of the Mayor's Office responsible for the development of the Civic Center, and to abide by all city zoning regulations.

Because the site for the Annex was designated a public place, the City could not transfer the property to the United States until the New York State Legislature authorized the demapping of the site. Accordingly, Mr. Paduano states that the City Council held public hearings in May and June

1971 and thereafter passed a home rule message requesting the State Legislature to discontinue the site as a public place which it did on June 25, 1971, (Exh. A attached to Affid. of George Paduano, dated February 23, 1972) with full knowledge according to Mr. Paduano that the site was to be used for the Annex, which would include both the U.S. Attorney's Office and the MCC.[3] The City Planning Commission, after public hearing, on July 14, 1971 recommended demapping the site (Exh. B attached to Affid. of George Paduano, dated February 23, 1971) and on August 19, 1971 the Board of Estimate held public hearings and passed resolutions to demap the site and convey the property to the United States for the construction of the Annex, including the MCC. (Exh. C attached to Affid. of George Paduano, dated February 23, 1972.) There was no opposition to the demapping or the conveyance expressed at the hearings.

At the time the United States acquired the site, it was occupied by a six story office building, a five story loft building, a 22 family apartment building and a Transit Authority generating substation which will remain at its present location in the center of the site indefinitely. At best these former buildings can be described as eyesores.

In accordance with its agreement with OLMD, GSA hired an architectural firm, Gruzen and Partners, who had designed and supervised the construction of the New York City Police Headquarters, located opposite the site of the Annex, and who were familiar with the architecture of the surrounding buildings.

Opinion

In a memorandum dated February 23, 1971 (Exh. H attached to Affid. of George Paduano dated February 23, 1972) addressed to the Assistant Commissioner, Operational Planning and entitled "Application of the National Environmental Policy Act of 1969 Relative to Foley Square Courthouse Annex," Mr. Paduano in accordance with GSA Order PBS 1095.1 §3(b) concluded that the Annex would have no adverse effects on the environment, including ecological systems, population distribution, transportation, water or air pollution, nor would there be any threat to health or life systems or urban congestion. Having made those conclusions, he was not required under GSA Order PBS 1095.1 §3(b) (which had been promulgated by GSA to implement section 102 (2)(C) of NEPA) to provide an environmental statement. In a subsequent memorandum stamped April 29, 1971, A. F. Sampson, Commissioner, Public Buildings Service, with respect to the determination of the environmental impact of the U.S. Attorney's Office only, concluded that pursuant to GSA Order PBS 1095.1 the building would not significantly affect the quality of the human environment for basically the same reasons expressed by Mr. Paduano. (See Exh. I attached to Affid. of George Paduano, dated February 23, 1972.) Those reasons include the following: all utilities required to service the new buildings were available; the Annex would be heated with steam, the lines for which were already on the site; electricity would be obtained from existing lines on the site; the Annex would connect to existing sewage facilities which would include a

secondary treatment plant to be built by the City; neither building would contain an incinerator; GSA would contract with commercial carters to dispose of garbage; the people who would occupy the U.S. Attorney's Office Building are presently either in the adjacent U.S. Courthouse or in the nearby Federal Building, 26 Federal Plaza; the area of the Courthouse that is vacated will be converted to additional courtroom space; the capacity of the MCC would be limited to approximately 450 people, none of whom would be a burden on existing transportation facilities; Duane Street, between Park Row and Centre Street would be made into a landscaped pedestrian mall; Cardinal Hayes Place would also become a pedestrian way, accessible only to emergency vehicles; the Annex would be surrounded by numerous federal, state and city office buildings, the New York City Police Headquarters and the Manhattan House of Detention; GSA and the architects had consulted with OLMD which suggested design changes in the exterior of the Annex; the Transit Authority substation would be faced in a manner similar to the facades of the two buildings comprising the Annex in order to completely integrate the three structures; the facade of the Annex had been redesigned to reflect the first cornice height of the Municipal Building, a prominent architectural feature of the U.S. Courthouse and the New York State Supreme Court Building; the corners of the U.S. Attorney's Building would be chamfered to reflect the geometry of the police headquarters and the Municipal Building; the MCC was redesigned so that it would also geometrically

relate to the buildings surrounding it. From all of these relevant environmental, including aesthetic, factors Mr. Paduano concluded that the Annex would have no emission producing facilities, would create no water or air pollution, would result in no increase in population density or burden on transportation, no increase in vehicular traffic, and the architecture and function of the Annex would blend in with that of other buildings in the Civic Center. Plaintiffs have offered no evidence to refute any of these findings or conclusions of Paduano and Sampson.

The plaintiffs have argued throughout that defendants have violated NEPA §102(2)(C) since they have not prepared an environmental-impact statement or performed the other activities required of an agency proposing a major federal action which will significantly affect the quality of the human environment. Yet the plain meaning of the statute makes it clear that there must be a determination that a particular federal action is both major and will significantly affect the environment prior to the requirement of an environmental statement. It is clear that NEPA "does not require an environmental-impact statement in every case in which a federal agency plans or finances a project. Echo Park Residents Committee v. Romney, ___ F. Supp. ___ [Civil No. 71-340] (C.D. Cal. 1971) [filed May 11, 1971]. Statements are required by the Act if the proposed project is 'major' and if it will have a 'significant effect' upon the quality of the environment."

Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore. 1971) (emphasis added). Thus, if the agency concedes that the project is major as do the defendants herein, "the only question is whether ... [the agency] acted arbitrarily in determining that the project would not have a 'significant effect' upon the quality of the human environment." Goose Hollow Foothills League v. Romney, supra at 879. Although the guidelines of the Council on Environmental Quality §5(b), 36 Fed. Reg. 7724-7729 (April 23, 1971), suggest that an environmental statement pursuant to NEPA §102(2)(C), 42 U.S.C. §4332(C) (1972) be prepared for all "[p]roposed action the environmental impact of which is likely to be highly controversial," these guidelines are advisory only. Greene County Planning Board v. Federal Power Commission, at 1410 Docket Nos. 71-1991 and 71-1996 (2d Cir. decided Jan. 17, 1972). Moreover, inasmuch as no one apparently ever appeared at the public hearings held by the City Council, the Board of Estimate and the City Planning Commission, the defendants were never put on notice that the construction was likely to be at all controversial until long after the defendants were firmly committed to the construction. Given the limited review this Court may make of the defendants' decision which is whether the action of the defendants appears to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," 5 U.S.C. §706 (1971); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971), there is clearly a sufficient record in exhibits A-C and

H-O attached to Mr. Paduano's affidavit to demonstrate that the decisions of Mr. Paduano and Mr. Sampson were not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. While it is an unnecessary finding, it would even appear that there is substantial evidence to support their conclusion. Thus, it is clear that plaintiffs cannot show a likelihood of success on the merits, an essential prerequisite to the issuance of a preliminary injunction. Citizens Committee for the Hudson Valley v. Volpe, 297 F. Supp. 804, 806 (S.D.N.Y. 1969). Nor have the plaintiffs demonstrated that they will suffer immediate and irreparable harm if the injunction is denied. Rather the evidence supports the conclusion that they will suffer no adverse environmental, including aesthetic, effects and that the nature of the Annex will blend with the function of most of the other buildings in the Civic Center. With regard to the question of a decline in property value or the possibility of "riots" in the MCC, there is no evidence to support them and they are speculative at best, Citizens Committee for the Hudson Valley v. Volpe, supra at 807, and cannot support a preliminary injunction. Finally, there is evidence that the Government will incur substantial damage if the project is delayed.

Mr. Paduano in his affidavit has stated that any delay in construction will cost the Government an additional $4,000.00 per day with additional escalated costs for the subsequent construction of the superstructure. In addition any delay in

construction will further lengthen the time the Government is required to use the Federal House of Detention and the time the Federal Courts and the U.S. Attorney's Office are without adequate space.

In conclusion, I find that all of the environmental factors relevant to the construction of the Annex have been considered by Mr. Paduano and that his conclusion that the Annex, which consists of both the U.S. Attorney's Office and the MCC, will not have a significant adverse impact on the environment is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. Moreover, the plaintiffs have not demonstrated a likelihood of success on the merits, irreparable harm in the event the injunction is not issued, nor that the injury to them if the injunction is not issued outweighs the injury to the Government if the injunction is issued.

Accordingly, and for the foregoing reasons, the plaintiffs' motion for a preliminary injunction is in all respects denied.

So ordered.

Dated: New York, N.Y.
March 17, 1972

s/ Charles H. Tenney
U.S.D.J.

Footnotes

[Same Title]

1. §4332. Cooperation of agencies; reports, availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

Footnotes

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

Footnotes

(D) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

2. In fact the 1963 map to which the plaintiffs refer shows the area in question as a parking lot, not a park as they have stated in their papers.

Footnotes

3. Plaintiffs have argued that any environmental study done by the defendants related only to the environmental impact of the U.S. Attorney's Office and did not include the MCC, and that any references to the Annex were meant to refer only to the U.S. Attorney's Office. The affidavit of Mr. Paduano and the exhibits attached thereto make it clear that the Annex includes both buildings and that only the report of Mr. Sampson was limited in its consideration to the U.S. Attorney's Office. See Exh. C and H attached to affid. of George Paduano, dated Feb. 23, 1972.

MEMORANDUM

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-242

DENIS HANLY, ET AL., PETITIONERS

v.

RICHARD E. KLEINDIENST, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The General Services Administration (GSA) determined that a proposed jail and related office buildings to be constructed as an addition to the Foley Square courthouse area in lower Manhattan would not have a significant effect on the local human environment, and therefore began construction without filing a detailed environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C)

(Pet. App. 2a-3a, 7a-9a). The petitioners, residents of the area, sought injunctive relief to require the issuance of such a statement before construction could continue (Pet. App. 3a). The district court, in an unreported opinion (Pet. App. 19a-34a), refused to issue the injunction, holding that the GSA determination that no environmental impact statement was required was not arbitrary and capricious, that petitioners could not show a likelihood of success on the merits of their case, and would not suffer irreparable harm if the injunction were denied (Pet. App. 30a). The court of appeals, however, ruled that the General Services Administration had not taken into account all the factual considerations that it must before issuing its threshold finding of no significant impact on the human environment (Pet. App. 9a-16a). The case was remanded for consideration of these matters by GSA and a new GSA threshold determination finding no significant impact was made on June 15, 1972. As petitioners state (Pet. 17), this determination has not yet been brought before the district court.

The petition for a writ of certiorari is filed to review the decision of the court of appeals entered on May 17, 1972, remanding the case to the district court. That decision was favorable to the petitioners. The present petition is premature, and presents no question warranting review by this Court.

The petitioners assert that, as a matter of law, a jail in lower Manhattan necessarily has a significant

impact on the human environment (Pet. 2-3). The court of appeals left that for the district court's determination upon full development of the facts if the petitioners choose to challenge the threshold GSA finding (Pet. App. 16a). Impact on the human environment is obviously a factual matter. This Court does not generally review factual matters, even when fully decided below. *United States* v. *Johnston*, 268 U.S. 220, 227; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440.

Such review would be particularly difficult in this case, since the June 15 threshold determination has not been tested in the district court, and thus this Court would not have the benefit of a full record on which to consider the question of its consistency with the National Environmental Policy Act. This case is, therefore, not ripe for review by this Court. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327; *American Construction Co.* v. *Jacksonville, T. & K. Ry. Co.*, 148 U.S. 372, 384; *Cobbledick* v. *United States*, 309 U.S. 323, 325. Contrary to petitioners' assertion (Pet. 2), this is not a case where injunctive relief is necessary to avoid a clear violation of the National Environmental Policy Act. GSA is presently in compliance with the Act, as interpreted by the court of appeals (Pet. 17). Petitioners' discussion of the merits of the threshold determination should be addressed in the first in-

stance to the district court, not this Court (Pet. 30-32).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[1] Petitioners' claim (Pet. 3) that the Department of Justice should also file an impact statement is also premature. The Department of Justice (and its Bureau of Prisons), as well as the judiciary, will be served by the facility. As the court below noted, GSA is "the agency responsible for the acquisition of the site, the design and construction of the buildings, and their ultimate operation" (Pet. App. 8a). To the extent that actions of the Justice Department as a tenant might affect the environment in a manner requiring an impact statement, the Department could participate with GSA in its preparation. See the respondents' Suggestion of Mootness (to be filed shortly) in *Upper Pecos Association* v. *Peterson*, No. 71-1133, certiorari granted, May 22, 1972 (406 U.S. 944). Again, this is a matter to be considered first by the district court.

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In The

Supreme Court of the United States

October Term, 1972

No. 72-242

DENIS HANLY, et al.,

Petitioners,

vs.

RICHARD E. KLEINDIENST, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

This memorandum is being submitted in reply to respondents' memorandum. Since our petition was prepared, the United States District Court for the Southern District of New York, has held that the General Services Administration's (GSA) June 15, 1972 determination (see Pet. 30-32) complied with the National Environmental Policy Act (NEPA) [42 U.S.C. Sec. 4332(2)(C)]. Petitioners are taking an appeal from this latest order and have already filed a brief with the United States Court of Appeals for the Second Circuit.

These latest developments point out the necessity for obtaining Supreme Court review of this case. The result of the Court of Appeals' earlier decision (Pet. 1a-17a) has been to bar any true compliance by the respondents with NEPA.

Meanwhile, construction of the jail is continuing. Soon it will be too late to turn back from respondents' decision to build a jail should this Court decide that respondents have not complied with NEPA.

Respondents claim this case is not "ripe for review" (p. 3). However, the issues sought to be reviewed involve important questions and are fundamental to the further conduct of the case. Thus, immediate review by this Court is appropriate.

In Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 20 (1960), this Court granted certiorari to review the lower court's order transferring venue for the reason that the issue presented was an important question. (See also Beacon Theatres v. Westover, 359 U.S. 500, 501 (1959).)

In United States v. General Motors Corp., 323 U.S. 373, 377 (1945), this Court granted certiorari to review what items were to be considered in a new trial to ascertain compensation resulting from a taking of property by eminent domain on the grounds that this issue was fundamental to the further conduct of the case. (See also Land v. Dollar, 330 U.S. 731, 734 (1947).)

Cobbledick v. United States, 309 U.S. 323, 325 (1940), cited by respondents (p. 3), actually supports certiorari in this case. The Court there

said that certiorari would be granted where waiting until the case was completed in the lower courts would practically defeat the right to any review at all. The court cited as an example the predecessor of 28 U.S.C. Sec. 1292(a)(1) which grants the right to appeal in all cases involving interlocutory injunctions.

Obviously, our case is a prime candidate for immediate review. The lower courts are proceeding under a weakened interpretation of NEPA. Should petitioners have to wait until a final judgment below, they will effectively be denied any review because the jail will be well on its way to completion.

Respondents claim that petitioners are seeking review of a "factual matter" (p. 3). Actually, this case involves whether respondents complied with NEPA. The answer depends on NEPA's meaning which is a question of law. (See Pet. 26-28.)

Petitioners contend that GSA's determination that no environmental impact statement was required violated NEPA. The Court of Appeals, in spite of finding that GSA had ignored the most crucial factors in determining that no statement was required, gave GSA another chance to make its own determination whether to file an impact statement. Such a decision invited GSA to resubmit its earlier determination in altered form, which is just what happened.

Thus, this case involves only issues of law.

Respectfully submitted,

s/ Alfred S. Julien
Attorney for Petitioners

October 1972